Supreme Court, U.S.
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No. 97-1721

In the Supreme Court of the United States

OCTOBER TERM, 1997

ERIC ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to grant certiorari to review the denial by a court of appeals of a certificate of appealability.

2. Whether the court of appeals erred in denying petitioner a certificate of appealability in his challenge, pursuant to 28 U.S.C. 2255, to his conviction under 18 U.S.C. 924(c).

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OPINIONS BELOW

The order of the court of appeals denying petitioner a certificate of appealability is unreported. Pet. App. A1. The order of the district court denying petitioner's motion under 28 U.S.C. 2255 is also unreported. Pet. App. C1-C10.

JURISDICTION

The order of the court of appeals was entered on May 16, 1997. A petition for rehearing was denied on January 29, 1998. Pet. App. B1. The petition for a writ of certiorari was filed on April 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count I); using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Count III); assaulting a federal agent, in violation of 18 U.S.C. 111 (Count V); and three counts of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) (Counts VI, VII, and IX). He was sentenced to 87 months' imprisonment on Counts I, VI, VII and IX, to be served concurrently, and a consecutive sentence of 60 months' imprisonment on Count III. Pet. App. C1. Petitioner did not appeal. Pet. 7.

After this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), petitioner filed a motion under 28 U.S.C. 2255 challenging the validity of his guilty plea to the Section 924(c) count. The district court denied the motion, Pet. App. C1-C10, and the court of appeals denied a certificate of appealability, *id.* at A1.

1. On November 28, 1992, petitioner agreed to sell three kilograms of cocaine to a confidential informant working with the Bureau of Alcohol, Tobacco, and Firearms (ATF). Petitioner arrived at the residence where the sale was to occur in a Lumina van, entered the residence, and then returned to the van. The informant then arrived, accompanied by an undercover ATF agent. The two men parked behind petitioner's van, and the informant went into the residence, from which he telephoned petitioner, who was using a cellular phone inside his van. Petitioner agreed that

the buyers could test the cocaine. Albert Johnston, a co-conspirator, brought the cocaine out of the house to the undercover agent's vehicle. The agent took possession of the cocaine, following which he gave a prearranged signal to other agents to arrest petitioner. Pet. App. E1-E2; Presentence Investigative Report (PSR) 6.

ATF agents approached petitioner's van, shouted "police," and ordered him to exit. Instead, petitioner put his vehicle in reverse and started to drive away. An ATF agent grabbed petitioner's hair, but petitioner drove off with the agent hanging onto the side of the van. During the escape attempt, petitioner reached for a gun on the passenger seat of his van, and the agent fired one shot into the van. The agent lost his grip and fell to the street, injuring his head and hands. When the van was stopped by another car, petitioner exited and ran through various backyards and over fences. Following petitioner's apprehension and arrest, ATF agents found a gun and cellular telephone on the ground and another weapon on the passenger seat of the van. Pet. App. E2-E3; PSR 6-7.

2. Petitioner was indicted and charged with ten offenses.[1] He entered into a plea agreement with the government under Federal Rule of Criminal Procedure 11(e)(1)(C). Def. Mot. to Vacate Conviction Pursuant to U.S.C. § 2255, at 2 (filed May 23, 1996). At his

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[1] In addition to the offenses to which he pleaded guilty, see page 2, *supra*, petitioner was charged with distribution of cocaine, in violation of 21 U.S.C. 841 (Count II); use of a telephone to facilitate a drug offense, in violation of 21 U.S.C. 843(b) (Count IV); and two counts of being a convicted felon in possession of ammunition, in violation of 18 U.S.C. 922(g)(1) (Counts VIII and X). See Indictment, Crim. No. 92-81100 (E.D. Mich. S. Div., filed Dec. 8, 1992).

change of plea hearing, the district court informed petitioner that he had been charged in Count III with "[u]se and [c]arrying" of two firearms "during and in relation to a drug trafficking crime." Pet. App. D7-D8. Petitioner acknowledged that he had discussed that count with his counsel, *id.* at D11, and repeatedly admitted his guilt of the offense in open court. *Id.* at D14-D15, D17 (petitioner acknowledges that he used and carried weapons "in relation to" his drug trafficking crime on November 28, 1992). Petitioner also stated, however, "I have been shot twice, your Honor, that's why I was carrying them [*i.e.*, firearms]," *id.* at D17, and volunteered, "When you are dealing with drugs, you don't need firearms," *id.* at D18. The following exchange then occurred:

> THE COURT: Well, you were carrying them [*i.e.*, the guns] while you were dealing drugs, to protect yourself; is that right?
>
> [PETITIONER]: Right.
>
> THE COURT: That takes care of that.

Id. at D18. Petitioner did not appeal from his convictions or sentence.

3. In *Bailey* v. *United States*, 516 U.S. 137, 150 (1995), this Court held that "[t]o sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm." *Id.* at 148. By contrast, the possession of a firearm—without more—does not constitute a "use,"

nor does "placement of a firearm to provide a sense of security or to embolden." *Id.* at 149.

4. On April 24, 1996, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA or the Act), Pub. L. No. 104-132, 110 Stat. 1214. Title I of the Act made changes to the law governing motions for collateral relief for federal prisoners under 28 U.S.C. 2255. Section 102 of the Act amended 28 U.S.C. 2253 to require a prisoner to obtain a certificate of appealability before appealing from a district court's denial of his Section 2255 motion. The new provision states that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * the final order in a proceeding under Section 2255." 110 Stat. 1217, 28 U.S.C. 2253(c)(1)(B) (Supp. II 1996). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996).

5. On May 23, 1996, petitioner filed a motion under 28 U.S.C. 2255, seeking to vacate his guilty plea to the Section 924(c) charge in light of *Bailey*. Def. Mot. to Vacate Conviction Pursuant to U.S.C. § 2255.[2] Petitioner argued that he did not "use" a firearm under *Bailey* and that there was no factual basis to conclude that he was "carrying" a firearm "in relation to" a drug trafficking offense. The district court denied the motion, holding that "petitioner 'carried' the firearm found in his van" because he transported it in his

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[2] Petitioner's motion also challenged his guilty plea to Count Five (assaulting a federal agent). The district court rejected that claim, Pet. App. C5-C10, and petitioner does not renew it in this Court.

van to the drug transaction, and it was available and within petitioner's reach during that transaction. Pet. App. C3. The district court also rejected petitioner's claim that the weapons were not carried "in relation to" a drug trafficking offense, finding that "it was reasonable for the court to conclude by a preponderance that the weapon in [petitioner's] van furthered the crime of conspiracy, using it to protect himself during the drug deal." *Id.* at C4-C5.

6. Petitioner filed a notice of appeal, which was treated by the court of appeals as a request for a certificate of appealability. The court denied the certificate. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 1-2, 19-20) that the court of appeals erred in denying him a certificate of appealability. As petitioner notes (Pet. 11-12), that contention presents the threshold question whether this Court has jurisdiction to grant certiorari to review a court of appeals' denial of a certificate of appealability. In *Hohn* v. *United States*, No. 96-8986 (June 15, 1998), the Court held that it has jurisdiction under 28 U.S.C. 1254(1) to review the denial of a certificate of appealability. The Court should not exercise that jurisdiction here, however, because petitioner's underlying claim does not warrant this Court's review.

A certificate of appealability may issue only when the applicant has made "a substantial showing of the denial of a constitutional right." AEDPA § 102, 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996). Petitioner claims (Pet. 13-22) that his constitutional rights were violated because there was no factual

basis to support his guilty plea on the Section 924(c) charge. That fact-bound claim lacks merit.

To gain relief on a defaulted claim, petitioner would have to show that "constitutional error in his guilty plea colloquy has probably resulted in the conviction of one who is actually innocent." *Bousley* v. *United States*, 118 S. Ct. 1604, 1611 (1998) (internal quotation marks omitted). A mere deficiency in the factual basis is not sufficient, under *Bousley*, to justify collateral review of a defaulted claim, however, even if it is assumed that such a Rule 11-based claim is cognizable under Section 2255. Cf. *United States* v. *Timmreck*, 441 U.S. 780 (1979) (deficiency in Rule 11 procedure not cognizable under Section 2255). Here, in any event, there was a sufficient factual basis for petitioner's plea, and petitioner has made no other showing of "actual innocence." Thus, under *Bousley*, he is ineligible for collateral review of any defaulted constitutional claim that he might assert.

The factual basis for petitioner's plea of guilty to using or carrying a firearm during and in relation to a drug trafficking crime was adequate. Petitioner transported guns in his van to a location where he distributed three kilograms of cocaine. Pet. App. C3, E1-E3. Following petitioner's arrest after he fled from the van, ATF agents found a gun on the ground and another on the passenger seat of the van. *Ibid.*; PSR 7. Petitioner acknowledged at his change of plea hearing that he "carried" the guns "while [he was] dealing drugs, to protect [him]self." See *id.* at D18.

Those facts are more than sufficient to support petitioner's plea to carrying a firearm during and in relation to a drug trafficking crime. Petitioner repeatedly admitted at his plea hearing that he "carried" the guns. See Pet. App. D17, D18, D20-D21.

And this Court has recently made clear that a person who, like petitioner, "knowingly possesses and conveys firearms in a vehicle * * * which the person accompanies" "carries a firearm" within the meaning of Section 924(c). See *Muscarello* v. *United States*, No. 96-1654 (June 8, 1998), slip op. 1.

Petitioner's contention (Pet. 14-18) that he did not carry the guns "in relation to" the drug sale is unpersuasive. This Court has explained that the phrase "in relation to" requires that "the firearm must have some purpose or effect with respect to the drug trafficking crime." *Smith* v. *United States*, 508 U.S. 223, 238 (1993). Here, the guns served the purpose that they serve in "the ordinary case under § 924(c)(1)," "facilitat[ing] the offense by providing a means of protection." *Ibid.* (internal quotation marks omitted). Although petitioner disavowed that drug dealers "need" firearms, he acknowledged at his change of plea hearing that he carried the guns "to protect [him]self" during the drug sale. See Pet. App. D18.

Even if the factual basis supporting petitioner's plea were insufficient, that deficiency would not entitle him to a certificate of appealability. An inadequate factual basis would violate petitioner's rights under Federal Rule of Criminal Procedure 11(f) but would not violate his "constitutional" rights as required for him to merit a certificate. See 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996).

Petitioner's attempt (Pet. 15-16, 19) to transform his Rule 11 claim of an inadequate factual basis into a constitutional claim that his plea was not knowing and voluntary, see *Henderson* v. *Morgan*, 426 U.S. 637 (1976), is unavailing. The district court repeatedly informed petitioner at his change of plea hearing that the statute required use or carrying "in relation

to" drug trafficking. See Pet. App. D7, D17. Petitioner acknowledged that he had discussed the charges with his counsel and, in open court, admitted his guilt of the crime. See page 4, *supra*. Those circumstances raise a presumption that petitioner was informed of the nature of the charges against him. *Bousley*, 118 S. Ct. at 1608-1609; *Henderson*, 426 U.S. at 647.

Nothing in the record rebuts that presumption. Given petitioner's acknowledgement that he carried the guns "to protect [him]self" while "dealing drugs," Pet. App. D18, his earlier statement that "[w]hen you are dealing with drugs, you don't need firearms," *ibid.*, cannot be viewed as a "denial" (see Pet. 13, 15, 16, 19) of the "in relation to" element of the offense. Neither the discussion at petitioner's change of plea hearing, see Pet. App. D1-D30, nor subsequent legal developments, *e.g.*, *Smith*, *supra* (expounding on meaning of phrase "in relation to"), suggest that petitioner misunderstood or was misinformed of the legal meaning of the "in relation to" requirement when he pleaded guilty. Cf. *Bousley*, 118 S. Ct. at 1609 (plea constitutionally invalid when defendant was misinformed of an element of the offense or when defendant, counsel, and court misunderstood an element because of subsequent legal developments).[3]

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[3] Petitioner cannot rely on this Court's clarification of the meaning of "use" in *Bailey*, *supra*, because petitioner's plea rested on his carrying the firearms, not his using them. See Pet. App. C2-C4, D17-D18; pp. 4, 6, 7, *supra*. Cf. *Bousley*, 118 S. Ct. 1609, 1611-1612 (defendant's plea under Section 924(c) unintelligent when he was misinformed about meaning of "use" and indictment did not charge "carrying"). And, although petitioner "reserve[d]" (Pet. 15 n.6) the issue whether or not he was properly informed of the meaning of "carries," this Court's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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decision in *Muscarello, supra*, is fully consistent with the understanding of that term at petitioner's change of plea hearing.